91-627

Supreme Court, U.S.
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NO. 91-_____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF ARIZONA,

Petitioner,

-vs-

VOATRESS MULLEN, JR.,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION ONE

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QUESTION PRESENTED

Did the Arizona Court of Appeals err in finding a violation of the Fourth Amendment's protection against unreasonable search and seizure when a police officer initiated an encounter with the defendant who was waiting at a bus stop where the only reason for the encounter was to ask why defendant was staring at the officer's patrol car as it passed by?

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OPINIONS BELOW

The Arizona Court of Appeals' December 11, 1990 opinion holding that the trial court properly found the encounter between defendant and the officer to be an investigatory detention without justifiable suspicion proscribed by the Fourth Amendment is found in ___ Ariz. ___, 812 P.2d 1064 (1990). The opinion is appended here as Exhibit A.

The Arizona Supreme Court's order of July 11, 1991 denying the Petition for Review by the Supreme Court is appended here as Exhibit B.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals which the state asks this Court to review was entered on December 11, 1990. The Arizona Supreme Court denied the state's petition for review on July 11, 1991. This petition is filed within 90 days from that denial, on or before October 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive anyperson of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

In the mid-afternoon on May 16, 1988, City of Phoenix Police Officer Leeper observed defendant alone, at a bus stop. Officer Leeper's attention was drawn to him because defendant stared at the officer's patrol car as it approached and passed. Then, by watching in the rear view mirror, Officer Leeper saw defendant lean forward in his seat to view the patrol car as it proceeded approximately one half mile down the street.

The officer returned to the area, parked his car and approached defendant on foot. After introducing himself, the officer asked why defendant had been staring at the patrol car. Defendant replied that he was curious if the officer was using the vehicle computer. Upon a request for identification, defendant

produced a driver's license. Also, upon request, defendant allowed the officer to look inside his backpack. The officer saw sweat clothes on top, but did not look beyond them. There was no intimidation, show of force or threatening language by the officer during the encounter.

Soon thereafter, defendant's bus arrived. The officer returned the license and defendant boarded. With the information from the driver's license, the officer returned to his car and, through the vehicle computer, discovered an outstanding warrant for defendant's arrest. The bus was stopped by the officer at its next stop and the defendant was taken into custody. A search of the backpack produced a small quantity of cocaine and drug paraphernalia.

The state filed two felony charges of

Possession of a Narcotic Drug and Possession of Drug Paraphernalia. In the trial court, defendant moved to suppress the drug evidence, claiming the initial police contact was illegal. An evidentiary hearing was conducted where the officer was the lone witness to testify. The trial court found the initial police contact to be in violation of defendant's Fourth and Fourteenth Amendment protections. There was no separate findings of fact and conclusions of law, but the trial court's ruling was announced orally and is included in the appendix as Exhibit C, transcript of the motion to suppress. (See pages App. 39-44.) The evidence was ordered suppressed.

The state's motion to dismiss the charges without prejudice was granted, and a timely state's appeal to the Court of

Appeals was made, as authorized by 5B A.R.S. §13-4032(7). The federal question in the trial court's ruling on the motion to suppress was raised on appeal. The Court of Appeals disposed of the issue by stating:

> [J]udge Brown stated that he did not understand the law to permit the police, with no founded suspicion, "to stop at every bus stop and request any person to display identification." Nor do we. In the words of Brown v. Texas, we concur in the trial court's determination that a stop under these circumstances "exceeds tolerable limits."[1]

The state timely petitioned the Arizona Supreme Court for review.[2] A petition for writ of certiorari was filed in this Court

---

[1] 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

[2] A second issue, that the outstanding warrant provided an independent, untainted source for the evidence, was not raised in the petition for review.

following the Arizona Supreme Court's denial.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has erred as a matter of federal constitutional law in determining the police encounter without justifiable suspicion was a seizure under the Fourth Amendment. The resulting suppression of evidence was not required.

In its analysis, the Court of Appeals misinterpreted the decisions of this Court on the reasonableness of police encounters under the Fourth Amendment. The flawed reasoning is in two regards: (1) that a seizure occurs when a police officer approaches a person while seated at bus stop and requests identification, when no justifiable suspicion of criminal activity is apparent; and (2) that the nature of the encounter which follows the initial contact is irrelevant in the determination of whether a seizure has occurred.

In order to find the initial contact was impermissible, several decision were relied upon by the court below. State v. Graciano, 134 Ariz. 35, 657 P.2d 683 (1982); United States v. Cortez, 449 U.S. 411 (1981); United States v. Morrison, 546 F.2d 1372, (9th Cir. 1976); and Duran v. City of Douglas, 904 F.2d 1372, (9th Cir. 1990) were cited as controlling the issues herein. While those authorities are good law, they do not apply.

Those cases deal with the investigatory stop of a vehicle being driven on a highway. In each instance, a police officer used his lawful authority to order the driver of the vehicle to pull off the highway and stop to allow the police encounter. The Fourth Amendment analysis was then employed to determine whether the officers had reasonable

suspicion of criminal activity to use lawful authority to effectuate the stop. In each of these instances, the nature of the police officer's interaction with the person which followed the stop was not a factor in justifying the stop.

The threshold determination of whether a stop occurred in this instance was wrongly decided by the Court below. The dialogue between the prosecutor and the trial judge, during argument on the motion, illustrates this flawed determination:

> MR. PYEATTE: Your Honor, Mr. Mullen, Jr. was not stopped from doing Anything.
>
> THE COURT: Certainly he was.
>
> MR. PYEATTE: He was not compelled to do anything. There is no restraint on his liberty demonstrated whatsoever.
>
> THE COURT: Police do not have the right to stop someone and say, "let me see your identification."

MR. PYEATTE: Correct. He was not stopped.

THE COURT: He was.

MR. PYEATTE: Your Honor, on these facts--and I reviewed every known fact cited in the history of law in the United States that constitutes a stop. He was not detained from performing any action whatsoever.

THE COURT: You and I have a different interpretation of the facts.

The Motion to Suppress is granted. (Exhibit C at pp. App. 43-44.)

The Court of Appeals adopted the trial judge's finding that a stop occurred by relying on the vehicle stop line of cases. This explains why the entire analysis focused on the objective facts known to the officer prior to the contact with Mr. Mullen rather than what occurred after the contact.

Ironically, the decision below also cites the holding in Brown v. Texas,

supra, as supportive of the unreasonableness of the police contact here. While it does involve a pedestrian situation, Brown does not interpret the Fourth Amendment to disapprove the police behavior in this case. At issue in Brown was the constitutionality of a conviction for refusal to give identification under a Texas Law.

While walking away from a high drug activity area, Mr. Brown was stopped by two police officers who detained him for the purpose of requiring him to identify himself. Mr. Brown steadfastly refused and was arrested for failure to cooperate. This Court found there was an unreasonable seizure of Mr. Brown under the Fourth Amendment because the officers had no founded suspicion of criminal activity to justify the detention following the

repeated refusals to provide identification.

The holding in Brown does not restrict police officers from approaching an individual with less than founded suspicion of criminal activity. It does prohibit police officers from detaining a subject who refuses to cooperate by providing identification or answer questions in such a situation.

The Court of Appeals' reliance on Brown is sadly misplaced. Here, Mr. Mullen was not restricted in his movement or denied his freedom to walk away. He voluntarily gave identification when asked, provided answers to questions and consented to a search of his backpack. The officer permitted him to leave on the bus when it arrived. Yet the Court of Appeals found such cooperation irrelevant

to the Fourth Amendment question because the officer lacked a founded suspicion in the first instance. Brown is inconsistent with this reasoning.

Rejected by the Court of Appeals was the authority cited by Petitioner supporting the argument that this was a consensual encounter without Fourth Amendment implications. I.N.S. v. Delgado, 466 U.S. 210 (1984), holds that employees who were questioned by INS agents at worksites in a factory were not seized under the Fourth Amendment. The agents were conducting a factory survey to see whether illegal aliens were present as employees. Where there was nothing more than brief questioning without disruption of the work activity, the employees in that situation were not seized.

The Court of Appeals distinguished

Delgado by citing to the search warrant served on the factory to allow the agents' entry to conduct the survey or where the employer gave the agents permission to enter the premises. Apparently the Court of Appeals considered this factor to satisfy justifiable suspicion allowing the agents to speak to the employees.

To the contrary, this factor had no bearing on this Court's Fourth Amendment analysis. Chief Justice Rehnquist considered the significance of the probable cause which brought the officers to the factories:

> "5. Contrary to respondents' assertion, it also makes no difference in this case that the encounters took place inside a factory, a location usually not accessible to the public. The INS officers were lawfully present pursuant to consent or a warrant, and other people were in the area during the INS agents' questioning. Thus, the same considerations

> attending contacts between the police and citizens in public places should apply to the questions presented to the individual respondents here." (footnote 5, 466 U.S. at 217).

This Court's opinion in Delgado did not place any significance on the search warrant or permission to enter the factory. Thus, the considerations which are cited in Delgado defining the tolerable limits of police questioning do apply to Mr. Mullen's case.

Petitioner's argument is supported by the following quotation from Delgado:

> "What is apparent from Royer[3] and Brown is that police questioning, by itself, is unlikely to result in a Fourth Amendment violation. While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response. CF. Schneckloth v.

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[3] Florida v. Royer, 460 U.S. 491 (1983).

> Bustamonte, 412 US 218, 231-234. 36 L Ed 2d 854, 93 S Ct 2041 (1973). Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the person refuses to answer and the police take additional steps--such as those taken in Brown--to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure. United States v. Mendenhall, supra,[4] at 544, 64 L Ed 2d 497, 100 S Ct 1870; see Terry v. Ohio, 392 US 1, 21, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383 (1968)." (466 U.S. at 216-217).

Following the decision by the Court of Appeals, this Court issued its opinion in Florida v. Bostick, 501 U.S. ___, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). Consistent with the above authorities,

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[4] 466 U.S. 544.

this Court found no per se Fourth Amendment violation for officers to enter a bus, pick out Bostick without articulable suspicion and ask to inspect his ticket and identification. Established law was restated:

> "[A]s we have explained, no seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search his or her luggage-so long as the officers do not convey a message that compliance with their requests is required." 111 S.Ct. at 2388.

The dissent in Bostick raised the same criticism used by the Court of Appeals to find an unreasonable seizure under the Fourth Amendment in this case. That criticism was answered as follows:

> "The dissent reserves its strongest criticism for the proposition that police officers can approach individuals as to whom they have no reasonable suspicion and ask them

> potentially incriminating questions. But this proposition is by no means novel; ithas been endorsed by the Court any number of times. Terry, Royer, Rodriguez, and Delgado are just a few examples. As we have explained, today's decision follows logically from those decisions and breaks no new ground. Unless the dissent advocates overruling a long, unbroken line of decisions dating back more than 20 years, its criticism is not well taken." 111 S.Ct. at 2388.

The rule to determine whether a seizure occurs requires a court to consider all the circumstances surrounding the police contact to reveal whether the police conduct would have communicated to a reasonable person that the person was not free to walk away and terminate the encounter. Florida v. Bostick, 111 S.Ct. at 2389.

In Mr. Mullen's police encounter there was no evidence presented that the

police encounter was of such a nature as to communicate to him there was no choice but to cooperate. The opposite is true. The encounter was without implied or express coercion by use of the officer's authority. Despite this reality, the Court of Appeals failed to consider those factors because it misinterpreted the law as established in the above decisions of this Court.

CONCLUSION

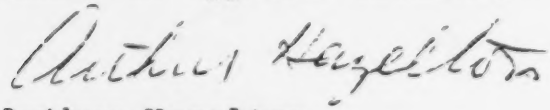
The Court of Appeals has saddled the State of Arizona with an erroneous interpretation of constitutional law. This was a published opinion which is now being given precedent value in direct conflict with the decisions of this Court. Because the decision rests entirely on federal authority, relief by this Court is necessary to insure the uniform interpretation of the Fourth Amendment.

DATED this 8th day of October, 1991.

Respectfully submitted,

Richard M. Romley
Maricopa County Attorney

Jessica Gifford Funkhouser
Chief of Appeals Division



Arthur Hazelton
Deputy County Attorney
Attorneys for Petitioner

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

Arthur Hazelton, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That he served three (3) copies of the Petition for Writ of Certiorari upon Dean W. Trebesch and James L. Edgar, Maricopa County Public Defender's Office, Attorneys for Voatress Mullen, Jr., by personal service at 132 South Central, Suite 6, Phoenix, Arizona, 85004.

Additionally, as a courtesy, he herewith certifies that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States Mail, with first class postage prepaid, addressed to

the Solicitor General, Department of Justice, Washington, D.C., 20530.

DATED this 8th Day of October, 1991.

Arthur Hazelton

ARTHUR HAZELTON
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Telephone: (602) 261-5941

SUBSCRIBED AND SWORN to before me this 8th day of October, 1991.

Betty J. Pahi

Betty J. Pahi
NOTARY PUBLIC

My Commission Expires:

My Commission Expires Feb. 3, 1992

APPENDICES

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 88-980
	)	
Appellant,	)	DEPARTMENT C
	)	
v.	)	O P I N I O N
	)	(Filed December
VOATRESS MULLEN, JR.,	)	11, 1990)
	)	
Appellee.	)	
	)	

Appeal from the Superior Court of
Maricopa County

Cause No. CR-88-05777

The Honorable I. Sylvan Brown, Judge

Affirmed

Richard M. Romley, Maricopa County Attorney, by H. Allen Gerhardt, Deputy County Attorney
Attorneys for Appellant Phoenix

Dean W. Trebesch, Maricopa County Public Defender, by James L. Edgar, Deputy Public Defender
Attorneys for Appellee Phoenix

F I D E L, Judge

Voatress Mullen, Jr. (defendant) was

charged by information with possession of a narcotic drug and possession of drug paraphernalia. After an evidentiary hearing, the trial court granted his motion to suppress incriminating evidence. Thereafter, the state moved to dismiss without prejudice and filed this appeal. We have jurisdiction pursuant to Ariz. Rev. Stat. Ann. § 13-4032(7)(1989).

FACTS

As a Phoenix police officer drove past a bus stop on Seventh Avenue, he noticed defendant leaning forward to watch the police car's course. The officer returned, parked his car, approached defendant on foot, and asked why defendant had been staring at his car. Defendant replied that he was curious whether the officer was using his computer terminal. The officer asked for identification, and

defendant produced his driver's license. As the officer held defendant's license, he asked about a backpack defendant was carrying and looked inside after defendant gave consent. The officer saw sweat clothes on top and did not look beyond them. When defendant's bus arrived, the officer returned defendant's license and defendant left. The officer then ran defendant's name through the computer, discovered an outstanding warrant, stopped the bus at the next bus stop, and took defendant into custody. A search of defendant's backpack produced drugs and drug paraphernalia.

On appeal, we address to issues: (1) Did the trial judge abuse his discretion by finding that defendant had been subjected to an illegal detention? (2) Did the trial judge properly order

suppression of the evidence that the search of defendant's backpack revealed?

JUSTIFIABLE SUSPICION

The brief detention of defendant was clearly investigatory in purpose. The officer sought and achieved identification and a superficial inspection of defendant's backpack. An investigatory detention is improper, however, unless an officer's prior assessment of the circumstances "raise[s] a justifiable suspicion that the particular individual to be detained is involved in criminal activity." State v. Graciano, 134 Ariz. 35, 37, 657 P.2d 683, 685 (1982) (quoting United States v. Cortez, 449 U.S. 411, 418 (1981) (emphasis omitted)).

In a recent decision outlining the civil liability of police officers for illegal detention, the Ninth Circuit Court

of Appeals explained:

> If there is one irreducible minimum in our Fourth Amendment jurisprudence, it is that a police officer may not detain an individual simply on the basis of suspicion in the air. No matter how peculiar, abrasive, unruly or distasteful a person's conduct may be, it cannot justify a police stop unless it suggests that some specific crime has been, or is about to be, committed, or that there is an imminent danger to persons or property. Were the law any different -- were police free to detain and question people only on their hunch that something may be amiss -- we would hardly have a need for the hundreds of founded suspicion cases the federal courts decide every year, for we would be living in a police state where law enforcement officers, not the courts, would determine who gets stopped and when.

Duran v. City of Douglas, 904 F.2d 1372, 1378 (9th Cir. 1990).

In this case, defendant's behavior neither indicated involvement in a specific crime nor threatened imminent danger. He was not near the scene of a recent crime,

nor was his stop the product of information the officer had received from informers or other officers. Defendant merely watched the officer's passing car in a way that caught the officer's attention. The officer could describe no more than the "suspicion in the air" that Graciano and Duran condemn as insufficient basis for a stop.

It does not justify the stop that defendant's identification proved fruitful in uncovering an outstanding warrant and in leading to the discovery of evidence of a present crime. A detention must be justifiable based on the officer's information and observations at the time, not by information later obtained. United States v. Morrison, 546 F.2d 319, 320 (9th Cir. 1976). The Supreme Court has further explained:

> [E]ven assuming that [the purpose of crime prevention] is served to

> some degree by [an officer's] stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.

Brown v. Texas, 443 U.S. 47, 52 (1979).

The state urges us to find, however, that the officer required no justifiable suspicion to confront defendant and request identification. Citing I.N.S. v. Delgado, 466 U.S. 210 (1984), the state argues that defendant was not in fact detained and that his compliance with the officer's request for identification was no more than a "consensual encounter" without Fourth Amendment implications.

We disagree. In Delgado, I.N.S. agents questioned employees and requested immigration papers from some at factories

of an employer that the agency suspected of systematically employing illegal aliens. The Supreme Court declined to find that the I.N.S. had seized the entire work force. Instead it treated the individual interviews as consensual encounters that did not ripen into detention. 466 U.S. at 219. In Delgado, however, the I.N.S. had probable cause to believe that a number of illegal aliens were working at the factory sites that it had chosen. Indeed, the agency had obtained a warrant to search the first two factory sites that it surveyed and obtained the employer's consent to survey the third. Id. at 212. Thus, we do not read Delgado to approve a request for identification based, as here, on no more than suspicion in the air.

The trial court in this case heard the witnesses, evaluated the evidence, and

permissibly determined that the stop of defendant was non-consensual. Judge Brown stated that he did not understand the law to permit the police, with no founded suspicion, "to stop at every bus stop and request any person to display identification." Nor do we. In the words of Brown v. Texas, we concur in the trial court's determination that a stop under these circumstances "exceeds tolerable limits."[1]

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[1] We rest the decision in this case explicitly on federal, not state, constitutional grounds. We do not separately consider whether the police conduct in these circumstances exceeded tolerable limits under article 2, § 8 of the Arizona Constitution ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law"), because the defendant has raised only a federal, not a state constitutional challenge. See Feldman & Abney, The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution, 20 Ariz. St. L.J. 115, 146 (1988)("If the record raises a state constitutional issue, and the text of the applicable state provision is

SUPPRESSION

The state argues on appeal that even if this were an illegal stop, the outstanding warrant provided an independent, untainted source for the evidence.[2] The state did not argue this position to the trial court, and has thus waived appellate review. State v. Brita, 158 Ariz. 121, 124, 761 P.2d 1025, 1028 (1988).[3]

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significantly different from the analogous federal clause, Arizona judges must . . . consider the impact . . . of our state constitution.").

[2] See Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (facts illegally "obtained [do not] become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others.").

[3] We note, however, that the outstanding warrant was not an "independent source"; its discovery followed directly from the initial stop. Achieving defendant's identification during the first, improper, encounter, the officer discovered the warrant alleged to justify the subsequent, fruitful search. Although the initial stop did not render the warrant itself forever "sacred and

In argument before the trial court, counsel focused exclusively on the question whether defendant was illegally detained; both counsel assumed in their arguments that the propriety of suppression turned entirely on that question. We have upheld the trial court's conclusion that the initial stop and request for identification violated the Fourth Amendment, and we uphold the trial court's decision to suppress the evidentiary products of that encounter. Whitely v. Warden, 401 U.S. 560, 568-69 (1971) (evidence seized after unconstitutional arrest should have been suppressed); United States v. Johns, 891 F.2d 243, 245 (9th Cir. 1989) (marijuana obtained

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inaccessible," its execution was tainted by immediacy and the absence of intervening circumstances. See Dunaway v. New York, 442 U.S. 200, 218-19 (1979) (confession that followed closely on illegal arrest, without intervening circumstances, was properly excluded).

as a result of identification at illegal stop was properly suppressed); State v. Main, 159 Ariz. 96, 99, 764 P.2d 1155, 1158 (App. 1988) ("If the search was unlawful the evidence found as a result of it . . . was properly suppressed.").

CONCLUSION

For the reasons stated in this opinion, the trial court's order of suppression is affirmed.

NOEL FIDEL, Presiding Judge

CONCURRING:

RUDOLPH J. GERBER, Judge

WILLIAM E. EUBANK, Judge

APPENDIX B

SUPREME COURT

STATE OF ARIZONA

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CLERK OF COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

402 ARIZONA STATE COURTS BUILDING
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TELEPHONE: (602) 542-9396

July 11, 1991

RE: STATE OF ARIZONA vs. VOATRESS MULLEN, JR.
Supreme Court NO. CR-91-0038-PR
Court of Appeals No. 1 CA-CR 88-980
Maricopa County No. CR 88-05777

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on July 10, 1991, in regard to the above-referenced cause:

ORDERED: Petition for Review by the Supreme Court = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 11th day of July, 1991.

NOEL K. DESSAINT, Clerk

TO: Hon. Grant Woods, Attorney General, 1275 West Washington, Phoenix, AZ 85007 Attn: Paul J. McMurdie, Esq.
Richard M. Romley, Maricopa County Attorney, Arizona Title Building, 111 West Monroe, Suite 1800, Phoenix, AZ 85002 Attn: Arthur G. Hazelton, Esq.
Dean W. Trebesch, Maricopa County Public Defender, 11 W. Jefferson, 10th Floor, Phoenix, AZ 85003 Attn: James L. Edgar, Esq.
Glen Clark, Clerk, Court of Appeals, Division One, 204 Arizona State Courts Bldg., 1501 W. Washington, Phoenix, AZ 85007-3329
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APPENDIX C

IN THE SUPERIOR COURT OF

THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff,	)	
vs.	)	No. CR88-05777
VOATRESS MULLEN, JR., Defendant.	)	

Phoenix, Arizona
August 5, 1988

BEFORE: The Honorable I. SYLVAN BROWN,
Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Motion to Suppress

MICHAEL N. VACCA
Official Court Reporter

Prepared for Appeal

SUPERIOR COURT

APP. 16

NOTES

SUPERIOR COURT

APPEARANCES:

CHARLES PYEATTE
Deputy County Attorney
For the State

DEBORAH COLE-WILLIAMS
Deputy Public Defender
For the Defendant

Phoenix, Arizona
August 5, 1988
11:17 a.m.

THE COURT: CR88-05777 State of Arizona versus Voatress Mullen, Jr.

This is the time regularly set for the hearing on the defendant's Motion to Suppress.

State ready?

MR. PYEATTE: Charles Pyeatte for the State. Ready, Your Honor.

THE COURT: Defense ready?

MS. COLE-WILLIAMS: Yes, Your Honor. Deborah Cole-Williams on behalf of Mr. Mullen, who is present in custody.

THE COURT: You may proceed.

MR. PYEATTE: Your Honor, I suppose that the State does, at this point, have the burden. I just thought it might be

faster, since Miss Cole-Williams knows what testimony she wants to elicit, if she proceeded first. I can go first if you prefer.

THE COURT: As I understood it, Miss Cole-Williams set forth certain facts in her Motion to Suppress and attached a partial transcript, and that the State has stipulated that those facts in fact do exist. But if you have any other evidence you would like to elicit, you can present whatever you want. But you certainly have the right to put on additional testimony, and do so at this point.

MS. COLE-WILLIAMS: Thank you, Your Honor. Officer?

DAVID BRIAN LEEPER,

called as a witness herein, having been

first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. COLE-WILLIAMS:

Q. Would you state your name for the record, please?

A. David Brian Leeper.

Q. And you are employed by the Phoenix Police Department?

A. Yes, I am.

Q. You testified on June 16th of this year in a preliminary hearing regarding Mr. Mullen, didn't you?

A. That's correct.

Q. Okay. And at that preliminary hearing, you testified that when you first saw Mr. Mullen, he was sitting at a bus stop. Correct?

A. That's correct.

Q. And you believed that he was staring at you?

A. Yes, he was.

Q. Was he -- what was he doing when you very first saw him?

A. What he was doing was looking at my vehicle, which was south of him, as I was traveling north.

Q. Were you the only vehicle on the road?

A. I don't recall. I mean, what do you mean by on the road?

Q. Was there other traffic?

A. Not that I was aware of.

Q. None at all?

A. Immediately next to me, no.

Q. In the vicinity?

A. To the rear of me, but none in

front of me. I was in the second lane.

Q. And your testimony at the prelim, I believe, was that you watched him in your rear view for about a half mile. Is that correct?

A. After I passed him, that's correct.

Q. During that time, did you ever take your eyes off of your rear view?

A. Glanced at the road; between the road and the rear view mirror.

Q. I'm sorry?

A. Well, as I was driving -- I have to watch while I am driving. I am also watching in the mirror.

Q. So your eyes were going back and forth?

A. Yes.

Q. Would you describe the bus stop

bench he was seated at?

A. It is a concrete bench; has a ceiling on it and side walls, approximately two to three feet, blocking the sides; and with a top.

Q. So it is surrounded on three sides by walls?

A. Yes, it is.

Q. When you first saw Mr. Mullen, could you tell how far back on the seat he was sitting?

A. He was sitting back against the seat, like I'm sitting now.

Q. Assuming for the moment that he was looking at you, what about that did you find suspicious?

A. At first when I saw him -- I have seen people routinely looking at police cars as they drive by.

Q. When you testified in the prelim, didn't you say that his watching you was suspicious enough for you to go back and talk to him?

A. What I testified to, to your prior question, when I first noticed him watching me -- like I just said, it is typical for people to watch me. As I passed, his extra effort to continually watch me aroused my suspicions.

Q. Why?

A. It is just uncommon to me that he was very curious to see that I kept proceeding north, to the point where I was almost a half mile, almost out of sight before he sat back.

Q. Well, you, of course, hadn't had any direct contact with him at that point, had you?

A. No, I did not.

Q. So you are assuming that he was watching you and continuing to watch you. It was an assumption on your part. Correct?

A. That's what I believe he was doing, yes.

Q. So when you turned around and went back to him, did he tell you he was waiting for a bus?

A. Yes, he did.

Q. And did he tell you what direction the bus was traveling?

A. Well, no, that wasn't a question. That wasn't the conversation with the witness.

Q. The side of the street he was seated on would have been by northbound traffic?

A. That's correct.

Q. Did you notice whether he had a bus transfer slip in his hand?

A. I didn't notice.

Q. You did notice he had a backpack next to him, didn't you?

A. That's correct.

Q. Where exactly was it?

A. Placed -- sitting right next to him, like where he was seated.

Q. Were his hands on it?

A. I don't recall.

Q. What is the first thing you said to him when you went up to him?

A. I asked him if I could speak to him.

Q. What did he say?

A. Okay.

Q. Then you asked him for

identification?

A. That's correct.

Q. Had you ever seen Mr. Mullen before?

A. No, I have not.

Q. Have you ever heard of him before?

A. No, I have not.

Q. Did you recognize him in any way when you first drove past?

A. No, I did not.

Q. You weren't responding to a call when you first saw him, were you?

A. No.

Q. And he was seated alone at the bus stop?

A. Yes, he was.

Q. As you first drove by him, did you and he make eye contact?

A. Yes, we did.

Q. Did he make any sudden or furtive movements as you drove by?

A. The only movement he made was as I passed him, he leaned forward where he could -- the side wall to the bus -- the side walls were preventing him from seeing me continue northbound. So he had to lean forward for him to continue to watch my vehicle.

Q. He didn't make any other movements, then, other than leaning forward?

A. No.

Q. And he didn't get up and leave?

A. No.

Q. And you are absolutely positive that he noticed you in particular as you drove by?

A. He told me he did.

Q. How did you know that for sure as you drove by?

A. Oh, as I drove by?

Q. Yes.

A. The eye contact. Looking at my vehicle.

Q. Did he make any motions at you?

A. No.

Q. Did you notice as you drove by if there was a bus behind you?

A. There was not. Yes, I did notice.

Q. Did you specifically look for one?

A. No. I don't have to specifically look for one to notice one.

MS. COLE-WILLIAMS: I have nothing further.

THE COURT: Mr. Pyeatte.

MR. PYEATTE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. PYEATTE:

Q. Officer Leeper, you came back to the bus stop and you asked Mr. Mullen why he was looking at you. Do you recall that?

A. Yes, I do.

Q. What reason did he give?

A. He stated he was curious if I was using my MODAC terminal in my police car.

Q. Did he use that term, MODAC?

A. He used the term computer.

Q. All right. And did you ask him if he would give you identification?

A. Yes, I did.

Q. Prior to doing that, did you display your police revolver or any other weapon to him?

A. No, I did not.

Q. Did you order him to move from the location which you found him?

A. No, I did not.

Q. Did you prevent him in making any effort on his part to move to another location?

A. No, I did not.

Q. During your entire contact with him at that point, did you mention to him that there was a possibility of arrest if he refused a request for identification?

A. No, I did not.

Q. Did you mention to him the possibility of arrest if he refused any request you made of him?

A. No, I did not.

Q. Did you physically hold onto him at any time?

A. No, I did not.

Q. When you approached him with the patrol car, did you turn on the red lights or the siren on the patrol car?

A. No, I did not.

Q. And while you were in contact with Mr. Mullen, did any bus arrive at the stop?

A. Yes, it did.

Q. And did you prevent him from boarding any bus?

A. No, I did not.

Q. What I want to be clear about, while you were talking to him, did you stop him from getting on any bus that came by?

A. No. I allowed him to get on the bus.

Q. You did what?

A. I permitted him to continue on.

Q. So he didn't miss any busses while he was talking to you?

A. No, he did not.

Q. And it was only after you determined from your car computer that there were warrants for the person with that name and date of birth that you then recontacted him on the bus and took him into custody?

A. That's correct.

Q. At any time during your conversation with Mr. Mullen when you were asking him for identification, when you were asking him his reason for being there, or when you were asking to look

inside the bag, did he tell you that he did not want to comply with those requests?

A. No, he did not.

MR. PYEATTE: I have no further questions, Your Honor.

THE COURT: One question. Officer, when you asked him for identification, did he give you some?

THE WITNESS: Yes, he did.

THE COURT: And you held onto it until the bus arrived?

THE WITNESS: I believe so. Yes, I did.

THE COURT: You may inquire.

REDIRECT EXAMINATION

BY MS. COLE-WILLIAMS:

Q. Officer, when the bus arrived while you were standing there, about how long did it wait before Mr. Mullen was able to get on?

A. The bus pulled up, I saw the bus. At that time I gave Mr. Mullen back his driver's license and told him, "Thank you for your time."

He was free to go. I mean, I wasn't detaining him.

Q. The bus arrived from a southbound direction?

A. That's correct.

Q. And when Mr. Mullen responded to your questions, all he said was he expressed curiosity about your computer?

A. That's correct.

Q. You were in full uniform. Correct?

A. That's correct.

MS. COLE-WILLIAMS: Nothing further.

THE COURT: Mr. Pyeatte?

MR. PYEATTE: Nothing further, Your Honor.

THE COURT: You may step down, Officer.

(Witness excused.)

THE COURT: Anything further in the way of testimony?

MR. PYEATTE: No, Your Honor.

MS. COLE-WILLIAMS: No, Your Honor.

THE COURT: Argument?

MS. COLE-WILLIAMS: Your Honor, since it is my motion --

THE COURT: Go ahead.

MS. COLE-WILLIAMS: Would you rather Mr. Pyeatte --

THE COURT: No. It is your motion.

MS. COLE-WILLIAMS: I am not going to reargue everything I said in the motion. I think the law I set forth is fairly clear.

In addition, I would direct the Court's attention to Kolander v. Lawson, a copy of which I gave the Court and Mr. Pyeatte. I think Kolander v. Lawson, the Brown case, Brown v. Texas, and an Arizona case, State v. Graciano are very persuasive and controlling in this case.

Mr. Mullen was doing absolutely nothing but sitting in a bus stop waiting for a bus, watching for his bus to arrive. He was doing nothing suspicious. There was no reason for the officer to approach him and demand identification. What he was doing there and what was in his

backpack is just basically none of the officer's business.

I find it offensive that this might be -- that citizens would be in the position where police officers could do that just out of curiosity, because there go all of us, Your Honor, myself, Mr. Pyeatte. And there is no indication of any suspicious activity going on. And the case law is very, very clear that there has to at least be an articulably suspicious set of circumstances; something has to be going on to warrant that initial contact. And there was not here.

For that reason, I think the Court should suppress the evidence seized in this case.

THE COURT: Mr. Pyeatte?

MR. PYEATTE: Thank you, Your Honor.

Your Honor, counsel, in concluding her argument, used the term initial contact, which was in the conclusion of her brief. In a four and-a-half page brief, defendant uses the word stop, or a variation of the word stop, a total of 15 times.

That is the issue. Nothing that counsel has to say comes into play. No constitutional right is triggered until there is a detention.

THE COURT: Oh, Mr. Pyeatte, then I take it that the police can stop at every bus stop, get out, and ask every person sitting at that bus stop for identification. And that is not a violation of the Fourth Amendment. Is that what you are telling me?

MR. PYEATTE: Not only am I telling

you that, Your Honor, but the Supreme Court, in Terry versus Ohio, is telling that to the Court, where it says, "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."

There was no restraint of Mr. Mullen's liberty.

THE COURT: When he holds his driver's license, that is not a restraint?

MR. PYEATTE: It is not, sir, because the driver's license was not held in such a way that prevented him from boarding a bus.

A similar set of facts was

addressed by the United States Supreme Court in Florida versus Royer. In Royer, the officers held not only his identification, but his plane ticket. The Supreme Court explicitly approved the action.

THE COURT: Right. But there was an articulable reason in Royer. What is the officer's articulable reason for demanding identification from somebody waiting for a bus?

MR. PYEATTE: Your Honor, he did not demand identification. He requested it. The request does not require any foundation in law, whatsoever. It is simply a request. The defendant was free to refuse it. Under every case we have cited, unless --

THE COURT: As I understand it, it is

your position that the police may stop at every bus stop and tell everybody there that they have to show identification.

MR. PYEATTE: No, Your Honor. The police may stop at every bust stop and request any person to display identification, and the person --

THE COURT: That is not my understanding of the law, Mr. Pyeatte, unfortunately. I think the law is very clear, and the law is specifically set forth by the Supreme Court in the State of Arizona in the Graciano case, where they stopped a motor vehicle for no other reason other than the fact that the didn't like the color of the driver of that vehicle.

In this case, maybe he didn't like the color of the defendant sitting

there. The police officer testified that people routinely look at police cars. That is certainly not an articulable reason.

MR. PYEATTE: Your Honor, Mr. Mullen, Jr. was not stopped from doing anything.

THE COURT: Certainly he was.

MR. PYEATTE: He was not compelled to do anything. There is no restraint on his liberty demonstrated whatsoever.

THE COURT: Police do not have the right to stop someone and say, "Let me see your identification."

MR. PYEATTE: Correct. He was not stopped.

THE COURT: He was.

MR. PYEATTE: Your Honor, on these facts -- and I reviewed every known fact cited in the history of law in the United

States that constitutes a stop. He was not detained from performing any action whatsoever.

THE COURT: You and I have different interpretation of the facts.

The Motion to Suppress is granted.

MS. COLE-WILLIAMS: Thank you, Your Honor.

* * * * * * *

I Michael N. Vacca, do hereby certify that the foregoing pages constitute a full, accurate typewritten record of my stenographic notes taken at said time and place, all done to the best of my skill and ability.

DATED this 23rd day of September, 1988.

_____

Official Court Reporter

SUPERIOR COURT

EDITOR'S NOTE

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No. 91-627

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF ARIZONA,

Petitioner,

-vs-

VOATRESS MULLEN, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS, DIVISION ONE

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel for Respondent

***Counsel of Record**

QUESTION PRESENTED

Where the trial court record demonstrates that the officer approached the respondent at a bus stop without reasonable suspicion of criminal activity and the prosecutor stipulates that the officer demanded compliance with his request that identification be produced, whether the trial court erred in its judgment that the Fourth Amendment was violated.

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No. 91-627

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October Term, 1991

STATE OF ARIZONA,

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-vs-

VOATRESS MULLEN, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS, DIVISION ONE

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Voatress Mullen, Jr., through undersigned counsel, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Arizona Court of Appeals in this case. That opinion is reported at ____ Ariz. ____, 812 P.2d 106.

STATEMENT

1. Respondent, Voatress Mullen, Jr., was seated at a bus stop awaiting the arrival of a bus in Phoenix, Arizona, in the afternoon of May 16, 1988. App. 2. Phoenix police officer David Leeper drove by in a marked patrol car. He concluded that respondent was watching the police car and decided to contact him. App. 7. He approached on foot. Id.

The prosecutor stipulated that Officer Leeper then demanded that respondent comply with his request to produce identification. See infra section 2. Respondent then gave the officer his driver's license. The officer recorded respondent's name and date of birth. App. 8. He asked respondent what he had in his carrying bag. Id. Respondent allowed the officer to examine the bag. Id. When the bus arrived, the officer returned respondent's license and permitted him to board the bus. App. 8. After the bus departed, the officer ran a computer search and found an outstanding warrant for respondent. App. 2. He followed the bus to the next stop. Id. He boarded the bus and placed respondent under arrest based on the warrant. Id. The officer searched respondent incident to the arrest and found various items of drug paraphernalia and a small quantity of illegal drugs. App. 2.

2. Respondent filed a Motion to Suppress and a supporting Memorandum of Points and Authorities in the trial court. App. 1-5. A partial transcript of Officer Leeper's preliminary hearing testimony was attached to the motion. App. 6-11. The Motion to Suppress requested an evidentiary hearing. App. 1. The

section of the Motion to Suppress labeled "Statement of Facts" alleged that the officer had demanded identification from the respondent. App. 2.

The State filed a Response to Motion to Suppress, which stipulated that the facts set forth in respondent's Memorandum of Points and Authorities were accurate. App. 12. The State contended that no evidentiary hearing was required. Id. The State's Response to Motion to Suppress states:

> COMES NOW the County Attorney, by and through counsel undersigned, and responds to defendant's Motion to Suppress as follows:
>
> I. FACTS:
>
> For purposes of the determination of this motion, the State stipulates that the facts as set forth in defendant's Memorandum of Points and Authorities and as illustrated by the portions of the Preliminary Hearing transcript attached thereto are accurate. The State does not believe that this matter requires an evidentiary hearing, for the reasons that the facts as stated in defendant's Memorandum, or as elaborated upon herein, should be sufficient for the Court to apply the law and determine the appropriate resolution of the issue at bar.

Id.

During the hearing on the Motion to Suppress the trial court confirmed that the State and respondent were stipulating to the accuracy of the facts set forth in the Motion to Suppress. (See Petition for Writ of Certiorari to Arizona Court of Appeal, Division One, App. 19). The officer testified during the Motion to Suppress hearing that he had asked respondent for identification. Id. at 26-27, 30. His preliminary hearing testimony also was that he had asked for identification. App. 8.

During the Motion to Suppress hearing, respondent's counsel contended that the officer had demanded identification. Id. at App. 37.

3. The trial court granted respondent's Motion to Suppress. See Petition for Writ of Certiorari to the Arizona Court of Appeals, Division One, App. 44. Although the trial court wrote no opinion and made no express findings of fact, the court did state: "Police do not have the right to stop someone and say, 'Let me see your identification!'" Id. at 43. The trial judge asked the prosecutor: "What is the officer's articulable reason for demanding identification from somebody waiting for a bus?" Id., at App. 41.

The trial court was also of the opinion that the police could not "stop at every bus stop and request any person to display identification," at least not when the stop was racially motivated. Id. at 42. The court suggested that respondent's race might have prompted the encounter. Id. at 42-43.

4. The Arizona Court of Appeals affirmed the suppression order. The Court of Appeals stated that officers could not ask for identification with no founded suspicion of criminal activity. The court concluded that respondent was detained and that the investigatory detention violated the Fourth Amendment.

5. The Arizona Supreme Court denied the State's petition for review without opinion on July 11, 1991.

SUMMARY OF ARGUMENT

Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual and asking a few questions. Florida v. Bostick, 501 U.S. _____, 115 L.Ed.2d 389, 111 S.Ct. 2382 (1991). Such an encounter is consensual and may occur even without the police having reasonable suspicion of criminal activity. See id. However, if the officer without reasonable suspicion demands that identification be produced, the encounter loses its consensual nature and the Fourth Amendment is violated. See id. This Court has made it clear that without reasonable suspicion the police may not demand cooperation and that "consent" that is the product of official intimidation or harassment is not consent. See id.

The State stipulated that the officer demanded identification from respondent. This demand was an unreasonable seizure and violated the Fourth Amendment. See id.

The burden was on the State to prove that the evidence was lawfully obtained. See 17 A.R.S. Rules of Crim.Proc. Rule 16.2(b); Bumper v. North Carolina, 391 U.S. 543 (1968). The prosecution did not meet its burden. The stipulation entered by the State could have influenced the trial judge's decision to find a Fourth Amendment violation. The trial court was correct in stating that the: "Police do not have the right to stop someone and say, 'Let me see your identification!'"

The parties stipulated before the trial court to facts which support the judgment below.

ARGUMENT

I. THE PROSECUTION STIPULATED THAT THE OFFICER DEMANDED COMPLIANCE WITH HIS REQUEST TO PRODUCE IDENTIFICATION.

This Court has made it clear that the Fourth Amendment is not violated whenever a police officer approaches a person and merely asks a few questions. If a reasonable person would feel free to disregard the officer and go about his business, the encounter is not considered an unreasonable seizure. Florida v. Bostick, 501 U.S. _____, 115 L.Ed.2d 389, 111 S.Ct. 2382 (1991). The encounter is constitutionally permitted even if the police are without reasonable suspicion of criminal activity. See id. However, the police may not demand "voluntary" cooperation. This Court stated that "consent" that is the product of official intimidation or harassment is not consent at all. See id.

Respondent submits that a police demand for identification communicates to a reasonable person that he is not free to ignore the police presence and go about his business. A reasonable person would not decline a police demand for identification. Law enforcement officers when they have no articulable reason to suspect criminal activity are not justified in demanding that an individual produce identification or submit to a search or respond to their questions.

The facts of this case clearly indicate that the police had no articulable suspicion of criminal activity when respondent was approached. The facts of this case as evidenced by the stipulation entered by the prosecutor indicate that Officer Leeper demanded

identification from respondent.

In Arizona, one who stipulates to certain facts is foreclosed from repudiating them on appeal. Wolf Corporation v. Louis, 11 Ariz. App. 352, 464 P.2d 672 (1970). A party may not complain on appeal that his choice of words in a stipulation did not state what he contends on appeal he really meant to say. See id., at 355, 464 P.2d at 675. Parties are bound by their stipulations. Pulliam v. Pulliam, 139 Ariz. 343, 678 P.2d 528 (1984). Stipulations made by previous counsel do not evaporate upon the retention of a new attorney. See id., at 346, 678 P.2d at 531. In Gangadean v. Flori Investment Company, 106 Ariz. 245, 248, 474 P.2d 1006, 1009 (1970), the Arizona Supreme Court stated: "Facts stipulated to by counsel are conclusive throughout the litigation and binding on the parties unless, upon appropriate and timely motion and for good cause shown, the parties are relieved therefrom."

II. THE PROSECUTION FAILED TO MEET ITS BURDEN TO PROVE THAT THE RESPONDENT CONSENTED TO THE PRODUCTION OF IDENTIFICATION.

In Bumper v. North Carolina, 391 U.S. 543 (1968), this Court stated that when the prosecution wishes to rely upon consent to justify the lawfulness of a search, it has the burden to prove that the consent was freely given. This Court stated that the prosecution's burden of proof: "cannot be discharged by showing no more than acquiescence to a claim of lawful authority." See id., at 548-549.

Under the Arizona Rules of Criminal Procedure the prosecutor had the burden of proving by a preponderance of the evidence to the

trial judge that the evidence was lawfully obtained. 17 A.R.S. Rules of Crim.Proc. Rule 16.2(b) states:

> b. Burden of Proof on Pretrial Motions to Suppress Evidence. The prosecutor shall have the burden of proving, by a preponderance of the evidence, the lawfulness in all respects of the acquisition of all evidence which he will use at trial. However, whenever the defense is entitled under Rule 15 to discover the circumstances surrounding the taking of any evidence by confession, or search and seizure, or defense counsel was present at the taking, or the evidence was obtained pursuant to a valid search warrant, the prosecutor's burden of proof shall arise only after the defendant has come forward with evidence of specific circumstances which establish a prima facie case that the evidence taken should be suppressed.

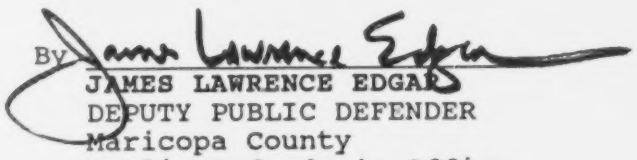
The trial judge observed the officer's testimony. The trial judge was entitled to discount the officer's testimony in its entirety or to rely on it heavily. The trial judge's comments made before granting the Motion to Suppress strongly suggest that he concluded that Officer Leeper had demanded identification. The stipulation entered by the State might have been a factor in the judge's decision.

Absent a clear abuse of discretion, Arizona appellate courts will not overrule a trial court's ruling on a Motion to Suppress. State v. Vandeveer, 23 Ariz. App. 331, 533 P.2d 91 (1975). Given the stipulation entered by the prosecutor, it is not clear that the trial court abused its discretion. It is respectfully submitted that the prosecution failed to meet its burden to prove that Officer Leeper did not demand identification from the respondent.

CONCLUSION

Since only questions of evidence and factual findings regarding whether the officer demanded identification from the respondent are involved, and the parties stipulated before the trial court to facts which clearly support the judgment below, respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,



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APPENDICES

App. 1
Appendix A

JUDI [illegible] CIV. CLERK
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1988 JUL 13 PM 2:22

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. VOATRESS MULLEN, JR. Defendant.	No. CR 88-05777 MOTION TO SUPPRESS (Oral Argument Requested) (Evidentiary Hearing Requested) (Assigned to the Honorable I. Sylvan Brown)

DEFENDANT, VOATRESS MULLEN, JR., by and through counsel undersigned, and pursuant to Rule 16.5, Arizona Rules of Criminal Procedure, hereby moves this Court to suppress all evidence seized pursuant to the unlawful search of his person and property which was conducted by a Phoenix police officer on May 16, 1988. The basis for this motion is that the initial contact of the defendant was illegal; therefore, the subsequent search of Mr. Mullen was illegal. This motion is based on the attached Memorandum of Points and Authorities, and the attached excerpts of the preliminary hearing transcript in this case, herein incorporated by reference.

Respectfully submitted this 13 day of July, 1988.

DEAN W. TREBESCH
MARICOPA COUNTY PUBLIC DEFENDER

By Deborah Cole-Williams
DEBORAH L. COLE-WILLIAMS
Deputy Public Defender
Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

Statement of Facts

On May 16, 1988, VOATRESS MULLEN was sitting at a bus stop on Seventh Avenue, north of Thomas Road, waiting for a bus. [Transcript, page 4.] He was periodically looking up and down the street for his bus. A police officer drove by, in a marked patrol car, and decided that MR. MULLEN was watching him. [Transcript, page 5.] For some reason he found this quite suspicious, so the officer turned his car around and returned to MR. MULLEN'S bus stop. [Transcript, page 5.] The officer "was curious," so he demanded identification and wanted to know what MR. MULLEN was doing and what he had inside his backpack. [Transcript, pages 5-6.] MR. MULLEN complied, and said that he was waiting for a bus. [Transcript, page 6.]

MR. MULLEN's bus arrived and he got on board. [Transcript, page 6.] After MR. MULLEN left the officer ran a computer warrant search and found an outstanding warrant for MR. MULLEN. [Transcript, pages 6-7.] He then followed the bus to the next stop and pulled MR. MULLEN off the bus. [Transcript, pages 7-8.] MR. MULLEN was placed under arrest and searched. [Transcript, page 8.] During a search of the backpack -- the one which had so piqued the officer's curiosity during their initial contact -- various items of "drug paraphernalia" and a minute quantity of white powder were found. [Transcript, page 8.]

Statement of Law

Police officers can not stop citizens on the street unless they have a reasonable and articulable suspicion that criminal activity is afoot. Terry v. Ohio, 88 S.Ct. 1868, 392 U.S. 1, 20 L. Ed. 2d 899 (1968); State v. Hein, 138 Ariz. 360, 674 P.2d 1358 (1983). To justify a stop the police must point to specific and articulable facts of which they were aware before the stop was made. State v. Valenzuela, 121 Ariz. 274, 589 P.2d 1306 (1979). There must,

be more than mere suspicion. State v. Petersen, 124 Ariz. 336, 604 P.2d 267 (App. 1979).

Even a mere investigatory stop must be based on articulable facts which demonstrate a reasonable suspicion that the individual was involved in criminal activity. United States v. Cortez, 101 S.Ct. 690, 449 U.S. 411, 66 L. Ed. 2d 621 (1981), cert. den. 455 U.S. 923 102 S.Ct. 1281, 71 L. Ed. 2d 464, reh. den. 102 S.Ct. 1648, 455 U.S. 1000, 871 L. Ed. 2d 877; State v. Master, 127 Ariz. 610, 619 P.2d 482 (1980). In Cortez, the United States Supreme Court held that the legality of an investigatory stop must be examined through a two prong test of the totality of the circumstances. The first prong assesses all of the circumstances of the stop, and allows for some subjectivity on the part of the police officer together with objective factors such as information from police reports, statistics, and the nature of the crime being investigated. Secondly, once this assessment is made, there must be a particularized and articulable suspicion that the particular individual being stopped is engaged in criminal activity or wrongdoing.

That test was applied in Arizona by State v. Graciano, 134 Ariz. 35, 653 P.2d 683 (1982), which involved the stop of an Hispanic-looking male who was lawfully driving a vehicle on the highway. There was nothing improper about his driving. No traffic violation or other criminal activity had been observed. The officer admitted that his sole purpose for making the stop was to determine whether the vehicle was stolen. That stop was held to be illegal because it could not be justified by the State under the Cortez standard, even though subsequent to the stop the officer learned that the vehicle was stolen. Therefore, the Arizona Supreme Court held that the first prong of the test — the assessment of all the circumstances — does not include a weighing of the officer's "unparticularized suspicion" or hunches about a suspect or situation.

Brown v. Texas, 99 S.Ct. 2637, 443 U.S. 47, 61 L. Ed. 2d 357 (1979), also supports MR. MULLEN's position. There, police oficers saw Brown and another unidentified male walk toward each other in an alleyway, known as an area of high drug activity, and then immediately separate. The officers approached Brown to investigate. However, the officers had no articulable suspicion of any criminal activity beyond what they had observed. The officers requested identification from Brown, but he refused. Brown was then arrested for violation of a local Texas ordinance requiring that identification be given on demand. His conviction was reversed by the United States Supreme Court because the stop was improper. The arresting officer testified that Brown "looked suspicious" and the only reason for stopping Brown was to ascertain his identity. The officer did not have an articulable suspicion, based on objective facts, that Brown was involved in any criminal activity. The Court held that the Fourth Amendment does not allow a police officer, without a specific basis for believing that the individual is involved in criminal activity, to stop that individual and demand identification.

The stop at issue here cannot be justified under Cortez or Graciano. MR. MULLEN was sitting at a bus stop waiting for a bus. That activity is neither suspicious nor criminal. Indeed, the use of the transit facilities is in fact invited and encouraged by the Phoenix city government and the transit authorities. The officer stated in his report that he believed MR. MULLEN was watching him. However, the officer conceded that Mr. Mullen was not engaged in any criminal activity. The stop was improper; therefore, the police officer had no legal justification to request identification from MR. MULLEN and no legal justification to inquire into the contents of MR. MULLEN's backpack. Accordingly, it follows that the subsequent conduct of the officer, and his search of MR. MULLLEN which revealed the illegal paraphernalia and drugs, is void under Wong Sun v. U.S., 83 S.Ct. 407, 371 U.S. 471, 9 L. Ed. 2d 441 (1963).

The initial contact with MR. MULLEN was illegal. Therefore, the subsequent arrest and search of MR. MULLEN was improper. For that reason, all evidence seized pursuant to the search of MR. MULLEN must be suppressed, and the charges should be dismissed as the result of the officer's illegal detention of MR. MULLEN.

Respectfully submitted this 13 day of July, 1988.

DEAN W. TREBESCH
MARICOPA COUNTY PUBLIC DEFENDER

By Deborah Cole-Williams
DEBORAH L. COLE-WILLIAMS
Deputy Public Defender
Attorney for Defendant

Copy of the foregoing motion
mailed/delivered this 13
day of July, 1988 to:

HON. I. SYLVAN BROWN
Judge of the Superior Court

MR. CHARLES PYEATTE
Deputy County Attorney

By
DEBORAH L. COLE-WILLIAMS
Deputy Public Defender

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were you in the vicinity of 2900 North 7th Avenue?

A Yes, I was.

Q Is 2900 North 7th Avenue in the City of Phoenix, County of Maricopa, State of Arizona?

A Yes, it is.

Q What were you doing at that location and at that time?

A Basically routine patrol.

Q And did you, while you were on patrol, notice anything unusual?

A I was just south of 7th Avenue and Thomas traveling northbound when I observed the defendant sitting at the bus stop.

Q You say you observed the defendant, the gentleman who was seated at the bus stop. Was that also the gentleman who is in the courtroom today?

A Yes, it is.

Q Could you point out who that gentleman is?

A It's the subject with the blue shirt on with a moustache, black curly hair.

MR. WINTER: Your Honor, may the record reflect the officer has positively identified the defendant?

THE COURT: It may.

BY MR. WINTER:

Q And what did you notice the defendant doing?

A He was staring at me as I approached him from the south of his location, and as I got parallel with him, he was watching me, and as I passed him, he leaned forward passed the bus stop getting actually out of his seat watching me travel northbound.

Q I see. What did you do next, Officer?

A Well, I watched him out of my rear view mirror until I approached Osborn, which is approximately half a mile north, and he sat back. In other words, he sat back up against the seat.

MR. MCGILLICUDDY: Excuse me, Judge --

BY MR. WINTER:

Q Please continue, Officer. You saw the subject lean back in his seat?

A At that time his activity gave me -- I felt was suspicious enough for me to at least come back and talk to him. So I went eastbound up to Third Avenue and I came up to Valley National Bank and approached him on foot.

Q Did you in fact speak to the defendant?

A Yes, I did.

Q And could you tell me what the subject of that conversation was or what you did?

A Basic conversation. I identified myself, and I was curious -- first of all while he was watching me as I drove northbound he stated he was curious if I was

using my vehicle Modac computer. I asked him for identification and asked him basically what was he doing in the area.

Q And what did he tell you?

A He stated that he was over at Encanto Park. It was a park just west of Thomas and 7th Avenue and that he was, you know, on his way home or from work. I can't recall.

Q I see. And then what happened?

A He gave me his drivers' license. I jotted down his name and his date of birth. He was carrying a -- I believe a blue carrying bag, and I asked him what was he carrying in his bag and he said, "Nothing, just some clothes." And I asked him if he would mind showing me. He agreed to show me. I looked in. I saw a pair of sweat clothes on top.

Then at that point the city bus pulled up. He didn't commit no crime that I was aware of. So I told him okay. I gave back his drivers' license and allowed him to enter the bus.

Q I see. What did you do next, Officer?

A Well, after he entered the bus, I walked back to my patrol car and I ran a routine warrant check under the name and date of birth he gave me, and it came back --

MR. MCGILLICUDDY: Objection; hearsay; no foundation.

MR. WINTER: Your Honor, I don't understand necessarily what defendant's objection is. We're asking what this officer did. He clearly is commenting on what he's doing. If the hearsay objection has to do with whoever entered the information into the computer in the first place, hearsay is allowable in this stage under Rule Five of the criminal procedure.

THE COURT: Well, for the purpose of preliminary hearing, I'll allow it.

MR. MCGILLICUDDY: May I complete my objection, Judge? There has been no foundation as to who the declarant was and whether that declarant would be available for testimony in Superior Court, and until the State can establish that, hearsay's not admissible.

THE COURT: Very well, the objection is still overruled.

MR. WINTER: Thank you, Your Honor.

Q Please tell me what happened after you ran this computer check?

A When I ran the computer check, it came back with a Mullen, Voatress. It was a warrant. So I entered my patrol car, went northbound, the bus was stopped at 7th Avenue and Osborn just north picking up subjects entering

the bus.

At that time I also entered the bus on foot and advised the driver I needed to speak to the subject that he picked up back on 7th Avenue and Thomas. He agreed. I asked Mr. Mullen to exit the bus with me, and at that time I placed him under arrest for suspicion on the warrant charge.

Q And did you do anything after that, Officer?

A Yes, I placed him back in my -- well, I searched him, you know. I placed him in the back of my patrol car, and I drove over to 7th Avenue and Osborn on the northeast corner there. I used the phone to verify the warrants, and while doing so, I searched his property. Upon searching his property, I found a scale, miniature scale, which is known to me to be used by --

MR. MCGILLICUDDY: Objection. Without foundation, there's no basis for his opinion as what the scale is or should be used for.

THE COURT: Sustained.

BY MR. WINTER:

Q Officer, have you made other arrests for narcotic drugs?

A Yes, I have.

Q How many? Do you have any idea?

A At least a dozen.

Q Have any of those arrests involved subjects

from the jail and was back and Oak is the beginning of my precinct and 7th Avenue. So basically it was just basically my precinct area.

Q I take it from what you just said there was nothing of a criminal nature going on in the vicinity of where you saw Mr. Mullen?

A At that particular moment or in the past? Not at that moment, no.

Q And you weren't responding to any call involving Mr. Mullen?

A No, I was not.

Q Basically all you saw was Mr. Mullen sitting at a bus stop; correct?

A Yes.

Q And he was there by himself?

A Yes.

Q And you were on patrol by yourself?

A Yes.

Q And the only thing you saw him do was looking at you as you drove by?

MR. WINTER: Your Honor, I'm going to object to this line of questioning as to irrelevant as to the issue of probable cause to possession of narcotics drugs and drug paraphernalia.

It is obviously establishing or going into a

JUDITH ALLEN, CLERK
BY J. Thomas DEP.
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Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. VOATRESS MULLEN, JR., Defendant.	NO. CR 88-05777 RESPONSE TO MOTION TO SUPPRESS (Assigned to the Honorable I. Sylvan Brown)

COMES NOW the County Attorney, by and through counsel undersigned, and responds to defendant's Motion to Suppress as follows:

I. FACTS:

For purposes of the determination of this motion, the State stipulates that the facts as set forth in defendant's Memorandum of Points and Authorities and as illustrated by the portions of the Preliminary Hearing transcript attached thereto are accurate. The State does not believe that this matter requires an evidentiary hearing, for the reasons that the facts as stated in defendant's Memorandum, or as elaborated upon herein, should be sufficient for the Court to apply the law and determine the appropriate resolution of the issue at bar.

According to the police report prepared by Phoenix Police Officer, David Leeper, and the testimony he gave at the preliminary hearing (Transcript, page 5), Officer Leeper's attention was drawn to Mr. Mullen because, while sitting on a bus bench as the officer drove by in his police car, Mr. Mullen was intently staring at the officer. Officer Leeper turned around and returned to the bus stop, identified himself as a police officer when making contact with the defendant, and begin to ask defendant some questions about why the defendant was paying attention to his passing patrol car. The rest of the conversation is as indicated in the statement of facts in defendant's Memorandum in support of the motion and the attached portions of the Transcript. During this contact between Officer Leeper and the defendant, at no time did the officer draw his weapon, issue any commands to Mr. Mullen, or prevent him from boarding a city bus and leaving the location of the initial contact.

II. LAW:

Insofar as the defendant has cited in his Memorandum, the applicable law related to a "stop" or "investigatory stop" of a citizen, that law is correctly cited. However, insofar as the defendant asserts that the contact between Officer Leeper and Mr. Mullen fell within the definition of "stop"--in other words, a detention triggering the Fourth Amendment protections--the law is incorrectly applied in this case. Specifically, the claim in the last paragraph on page four of defendant's Memorandum that the officer had to have "legal justification" to request

identification from the defendant or to inquire into the contents of his backpack is not an accurate statement of the law.

Essentially, the defendant would have this Court believe and rule that any contact between a uniformed peace officer and a citizen constitutes a "detention" for Fourth Amendment purposes. The Supreme Court of the United States, in a line of cases, has clearly stated that this is not so. In Terry v. Ohio, 392 U.S. 1 (1968), the Court Supreme Court noted:

> Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred. 392 U.S. at page 19, note 16.

Twelve years later, the United States Supreme Court in United States v. Mendenhall, 446 U.S. 544, 554 (1980), expanded on this test by adding the phrase "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave" is there a Fourth Amendment seizure. Almost identical language was adopted in defining what constitutes an arrest as perceived by the Arizona Supreme Court in State v. Winegar, 147 Ariz. 440, 449, 711 P.2d 579 (1985).

In Florida v. Royer, 460 U.S. 491, 501-502 (1983), agents at an airport spotted an individual who fit a "profile" of a drug smuggler. The Court noted that asking the defendant for his ticket and his driver's license to identify himself was permissible activity. It was only when the narcotics agents took his ticket away from him, preventing him from leaving the airport, and required

him to accompanying them to an interrogation room that he was effectively detained for Fourth Amendment purposes. This point was emphasized in a case shortly after Royer in which the Court said: ". . . our recent decision in Royer, supra, plainly implies that interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." INS v. Delgado, 466 U.S. 210, 80 L.Ed.2d 247, 255, 104 Sup.Ct. 1758 (1984).

In Delgado, agents of the United States Immigration and Naturalization Service were conducting what was termed a "factory survey." That means that the agents would enter a factory where they believe illegal aliens were employed, some agents positioning themselves near the exits, while other agents moved systematically through the factory, approaching employees and, after identifying themselves, asking the employees from one to three questions relating to their citizenship. During this time, although the INS agents displayed badges, carried walkie talkies, and were armed, the employees were free to continue their work and walk around within the factory, and the agents did not, at any point, point their weapons at any of the people they contacted.

The critical difference between this kind of police contact and that which occurred in Brown v. Texas, 443 U.S. 47 (1979), relied upon by defendant in his Memorandum, is that when Brown refused to give his identity to the officers, he was detained for the purpose of determining his identity.

In an effort to draw the distinction between Brown and the other comments made in its other cases, the Supreme Court gave the following explanation:

> Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the person refuses to answer and the police take additional steps--such as those taken in Brown--to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure. 80 L.Ed.2d at 255.

Mendenhall and Delgado have both been relied upon as recently as last month. Michigan v. Chesternut, 43 Crim. L. Rptr. 3077 (June 13, 1988).

The essence of defendant's argument in his Motion to Suppress is contained in the first sentence on page 5 of his motion: "The initial contact with Mr. Mullen was illegal." Seen from the viewpoint of a person who knows he is a fugitive from justice, any contact with a police officer may seem fearful or intimidating, but that viewpoint is not the legal test of such encounters. Throughout the cases cited from the United States Supreme as well as the Arizona Supreme Court in Winegar, the theme has remained the same: The essential question is whether, based on an objective view of the totality of the circumstances, the person questioned was "free to leave." That question is easily resolved in this case because, in fact, Officer Leeper did allow Mr. Mullen to board a city bus and proceed down the road. Mr. Mullen was not again contacted until the officer had determined that there were outstanding warrants for his arrest.

III. CONCLUSION:

Until such time as a citizen's liberty is interfered with by peace officer, the Fourth Amendment does not come into play. Viewing the circumstances of the initial contact between Officer Leeper and Mr. Mullen, there are no indications that the officer was employing any coercive methods to secure the information. Therefore, that contact was consensual, regardless of what emotions the defendant may have been experiencing. The simple fact that Officer Leeper permitted Mr. Mullen to board a bus and continue on his way discredits any argument that he was "detained." Therefore, all the cases cited by the defendant which are based upon a "stop" are inapplicable in this case. No use of police power or detention occurred until Office Leeper, aware that there were outstanding warrants for Mr. Mullen's arrest, boarded the bus and took him off it and into custody.

Respectfully submitted this 18th day of July, 1988.

THOMAS E. COLLINS
MARICOPA COUNTY ATTORNEY

BY Charles Pyeatte
Charles Pyeatte
Deputy County Attorney

Copy of the foregoing mailed/
delivered this 18th day of
July, 1988, to:

The Honorable I. Sylvan Brown
Judge of the Superior Court

Deborah L. Cole-Williams
Deputy Public Defender
132 South Central, Second Floor
Phoenix, Arizona 85004

BY _____
Charles Pyeatte
Deputy County Attorney

CP:bp7.18.1

IN THE Cent 1-J App. Court 19 - Appendix D

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STATE OF ARIZONA, COUNTY OF MARICOPA

PRETRIAL SERVICES AGENCY BACKGROUND INFORMATION

CR 88-05777 Aka

Defendant is advised he is not required to answer any questions if he feels the answers might be harmful to himself in this or future proceedings.

Book No. 023781

IDENTIFICATION & RESIDENCE: Sex M Ethnicity B Age 34 DOB 7-14-53

Name: Mullen, Dortress Jr. Phone:

Present address: Louanga Inn City: How long: 5-16-88

With whom: Relation:

Alternate address: 505 W Mulberry # City: PHX How long: 2 mo

Phone: 230-8737 With whom: Carl Murphy Relation: Friend

Previous address: City: How long:

Cont. time in AZ: Total time in AZ: Last time left AZ:

Where did you go: How long:

Birth State: Calif Citizenry:

MARITAL STATUS: S M Sep. Div. Com-Law Wid. How long: 15 yrs

Child support (no.) 3 Ages: 4y, 7y, 13y

Immediate family in Phoenix area you have contact with:

wife Children

EMPLOYMENT: Employed Unemployed Disabled Retired How long:

Present employer: Student West Wind Academy - Just No full p/t How long:

Address: When: Type of work:

Prior employer: How long:

Present student status: Monday Therapy Grade completed: 12+

CRIMINAL RECORD: (Convictions in AZ and other states and countries)

Charge	Date	Sentence	State

Presently on probation/parole: Officer:

Expires: Past Juvenile: Terminated:

RECORD OF APPEARANCE: Prior FTA: Date: 4-11-88 Court:

Charge: Dom Viol

Prior release on own recognizance or bail:

Date	Charge	Amount	Sentence

A 880113C
1A - 516

PRESENTLY OUT ON BOND/OR: Charge: DOM Viol Court: Sup Ct A

Bond/OR: 37250 Release date: Incustody Pending date: 6-7-88 A

Drug, alcohol, physical or mental treatment last 6 months:

Residence upon release: SAME

Phone: With whom:

OTHER INFORMATION:

Carl 230-8737

(5)

Public Defender